IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

AMERICAN ANTITRUST INSTITUTE, INC.,	)	
	)	
Plaintiff,	)	
	)	
v.	)	
	)	No. 02-CV-138 (CKK)
MICROSOFT CORPORATION,	)	
JOHN ASHCROFT, in his official capacity as Attorney General of the United States, and the UNITED STATES OF AMERICA,	)	
	)	
Defendants.	)	
	)	

DEFENDANTS UNITED STATES OF AMERICA AND JOHN ASHCROFT'S RENEWED MOTION TO DISMISS

Defendants United States of America and John Ashcroft (the "Federal Defendants"), by and through undersigned counsel, hereby move to dismiss this action, pursuant to Fed. R. Civ. P. 12(b). The United States has already moved to dismiss this action based on the original Complaint, and the Federal Defendants now renew this motion in light of the Amended Complaint. The Amended Complaint fails to state a claim for which relief can be granted and this Court lacks jurisdiction to hear Plaintiff's claims in any event. The reasons supporting this motion are set forth in more detail in Defendant United States of America's Memorandum of Points and Authorities in Opposition to Plaintiff's Motion for Preliminary Injunction and in Support of the United States' Motion to Dismiss, filed previously and incorporated herein, and in the accompanying Supplemental Memorandum of Points and Authorities. A proposed order is also attached for the Court's consideration.

THEREFORE, defendants United States of America and John Ashcroft respectfully request that the instant motion be GRANTED and that this action be DISMISSED.

Dated: February 12, 2002.

Respectfully submitted,

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and John Ashcroft

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FOR THE DISTRICT OF COLUMBIA

AMERICAN ANTITRUST INSTITUTE, INC.,	)	
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Plaintiff,	)	
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	)	
Defendants.	)	
	)	

[Proposed] **ORDER**

THIS MATTER having come before the Court on Plaintiff's Motion for Preliminary Injunction and Expedited Hearing and the opposition thereto, Defendant United States of America's Motion to Dismiss and Defendants United States of America and John Ashcroft's Renewed Motion to Dismiss and the opposition thereto, and the Court having considered the matter, it is hereby

ORDERED that Plaintiff's Motion for Preliminary Injunction is DENIED; and it is further

ORDERED that Defendants United States of America and John Ashcroft's Renewed Motion to Dismiss is GRANTED and this action is hereby DISMISSED.

SO ORDERED.

Dated: _____

_____
COLLEEN KOLLAR-KOTELLY
United States District Judge

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

AMERICAN ANTITRUST INSTITUTE, INC., Plaintiff, v. MICROSOFT CORPORATION, JOHN ASHCROFT, in his official capacity as Attorney General of the United States, and the UNITED STATES OF AMERICA, Defendants.	)	No. 02-CV-138 (CKK)

SUPPLEMENTAL MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANTS UNITED STATES OF AMERICA AND JOHN ASHCROFT'S RENEWED MOTION TO DISMISS

Apparently recognizing that the original Complaint filed in this action failed to properly assert facts supporting this Court's jurisdiction or a claim for which relief can be granted, Plaintiff has filed an Amended Complaint for Declaratory and Injunctive Relief ("Amended Complaint"). The Amended Complaint, however, suffers from the same fatal flaws as the original Complaint. Notwithstanding the change in verbiage in Plaintiff's pleading, the Tunney Act proceeding in the Antitrust Case is still the proper forum in which any Tunney Act compliance issues can be addressed, the Tunney Act still fails to provide for a private cause of action, this Court still lacks jurisdiction to hear Plaintiff's claims, and Plaintiff still has failed to establish a likelihood of success on the merits. Defendants United States of America and John Ashcroft (collectively, the "Federal Defendants" or the "Government") hereby incorporate the arguments set forth in the Memorandum of Points and Authorities in Opposition to Plaintiff's Motion for Preliminary Injunction and in Support of the United States' Motion to Dismiss

("United States' Memorandum" or "U.S. Mem."), and address below only the few additional matters raised by Plaintiff's Amended Complaint.[1]

The Amended Complaint is nothing more than a slightly modified version of the original Complaint. It adds Attorney General John Ashcroft as a Defendant, Amended Compl., ¶ 11; two paragraphs alleging that the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701-06, and 28 U.S.C. § 1361 (providing jurisdiction for actions in the nature of mandamus) provide the Court with jurisdiction and constitute applicable waivers of sovereign immunity, Amended Compl., ¶¶ 5, 7; and two "causes of action," one for judicial review under the APA and one for the alleged violation of Tunney Act rights by the Defendants. Amended Compl., ¶¶ 49-64. Plaintiff has also added or edited myriad other paragraphs of the original Complaint in an attempt to salvage this lawsuit. At bottom, however, the Amended Complaint alleges the same things, and seeks the same relief, as the original Complaint, and the action should be dismissed for the same reasons that applied to the original Complaint. See U.S. Mem. at 4-30. We briefly address below the new allegations found in the Amended Complaint.

ARGUMENT

I. Plaintiff's Invocation of 28 U.S.C. § 1361 Does Not Alter the Conclusion That This Action Should be Dismissed.

The main change between the original and Amended Complaints for purposes of the Government's Motion to Dismiss is the addition of Attorney General Ashcroft as a Defendant and the allegation that 28 U.S.C. § 1361 provides the Court with jurisdiction to hear this case. Amended

[1] The Government also uses the same abbreviations used in the United States' Memorandum.

Compl., ¶¶ 5, 7, 11. Section 1361 is inapplicable, however, for several reasons. First, it is well established that mandamus is not appropriate when another remedy exists. Second, the Federal Defendants have no obligations to Plaintiff, let alone the clear duty required for the existence of mandamus jurisdiction.

A. The Tunney Act Proceeding Provides an Alternative Forum Where Plaintiff's Concerns Will Be Addressed.

> Mandamus is an extraordinary remedy to be utilized only in the clearest and most compelling cases. The exercise of the power of mandamus is a matter committed to the sound discretion of the court, and the remedy is to be restricted to exigent circumstances. One critical consideration in determining the propriety of resort to a writ of mandamus is the question of alternative remedies; the writ is usually denied when such alternatives exist. Moreover, the alternative remedies that might call for refusal to resort to writ of mandamus encompass judicial remedies, as well as administrative ones . . . .

Cartier v. Secretary of State, 506 F.2d 191, 199 (D.C. Cir. 1974) (internal citations omitted); see also Heckler v. Ringer, 466 U.S. 602, 616 (1984) (mandamus "is intended to provide a remedy for a plaintiff only if he has exhausted all other avenues of relief . . . ."); Association of Am. Med. Colleges v. Califano, 569 F.2d 101, 110 n.80 (D.C. Cir. 1977) ("[t]he writ generally is denied when alternative remedies are available"); Simpson v. Reno, 902 F. Supp. 254, 256-58 (D.D.C. 1995), aff'd 1996 WL 556625 (D.C. Cir. 1996); Public Citizen v. Kantor, 864 F. Supp. 208, 212-14 (D.D.C. 1994).

Here, as discussed in the United States' Memorandum, an obvious alternative remedy exists in the Antitrust Case itself – Plaintiff has filed a comment regarding the RPFJ that raises the parties' alleged non-compliance with the Tunney Act, the Court in the Antitrust Case has directed the parties to address these issues in their February 27 filing with the Court, and Plaintiff can move to intervene or otherwise participate in the Tunney Act proceedings pursuant to 15 U.S.C. § 16(f)(3). U.S. Mem. at

6-10, 12-13.[2] In light of such an alternative forum, mandamus is clearly inappropriate. Public Citizen, 864 F. Supp. at 213 ("mere existence" of concerns regarding appropriateness of mandamus "indicates that there is no clear and compelling justification for mandamus relief"); National Wildlife Fed'n v. United States, 626 F.2d 917, 923-24 (D.C. Cir. 1980); Simpson, 902 F. Supp. at 256 (Plaintiff must demonstrate "that [its] right to the issuance of the writ is clear and indisputable"), 258 (possible existence of alternate judicial forum precludes mandamus).

B. The Federal Defendants Do Not Owe Plaintiff a Clear, Nondiscretionary Duty.

Moreover, apart from the availability of the Tunney Act proceeding as an alternative forum in which these matters will be addressed, mandamus is appropriate "only if the defendant owes [Plaintiff] a clear nondiscretionary duty." Ringer, 466 U.S. at 616; see also Simpson, 902 F. Supp. at 256 (defendants must have "peremptory duty to act"). The Tunney Act simply does not create any such duty that is owed to Plaintiff. As discussed in the United States' Memorandum, the Tunney Act itself provides no separate cause of action to enforce its provisions. U.S. Mem. at 5-10. This is a clear indication that it creates no "duties" to putative plaintiffs and that mandamus is inappropriate. Public Citizen, 864 F. Supp. at 213 ("§ 1361 does not create any new causes of action or substantive rights"); Protect Our Eagles' Trees (POETs) v. City of Lawrence, Kan., 715 F. Supp. 996, 998 (D. Kan. 1989) (where statute at issue does not create a right of action, no duty owed to plaintiff and mandamus relief unavailable).

Consideration of the Tunney Act and its purposes further supports this conclusion. The Tunney

[2] Indeed, Plaintiff has informed the undersigned that it intends to move to intervene in the Antitrust Case.

Act imposes no absolute obligations on the Government. Rather, it merely provides that if the Government wishes to settle an antitrust action by means of a consent judgment entered by a court, then it must comply with certain procedural requirements so that the court can determine whether the settlement is in the "public interest." 15 U.S.C. § 16(b) (applies to "consent judgments").[3] The Tunney Act requirements, to the extent that they create any "duties" at all, create duties owed to the court in the Antitrust Case, as it is the body that must make the public interest determination regarding a proposed settlement by consent judgment. 15 U.S.C. § 16(e), (f)(4). Nothing in the Tunney Act purports to create any nondiscretionary duties owed to third parties, and to hold otherwise would open the door to a potential floodgate of litigation collateral to the Tunney Act proceeding. Section 1361, therefore, provides Plaintiff with neither a substantive basis for relief, nor with any waiver of sovereign immunity. See Washington Legal Found. v. U.S. Sentencing Comm'n, 89 F.3d 897, 901-02 (D.C. Cir. 1996) (Section 1361 does not provide waiver of sovereign immunity where mandamus claim fails on the merits).[4]

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[3] The Government, of course, is free to dismiss its antitrust action, or continue to litigate it, without complying with the Tunney Act. See In Re: IBM Corp., 687 F.2d 591, 600-03 (2d Cir. 1982) (Tunney Act does not apply to stipulations of dismissal).

[4] In any event, the Government complied with the only "clear" mandates of the Tunney Act – the CIS "recite[s]" each of the points required by Section 16(b). See 15 U.S.C. § 16(b)(1)-(6); U.S. Mem. at 16-23. To the extent that Plaintiff believes the Government did not "adequately" address each of these issues, such a claim does not rest on the dictates of the Act but rather on Plaintiff's subjective reading of the Act. See U.S. Mem. at 21-23. Such a claim is simply not amenable to a mandamus action. Cartier, 506 F.2d at 199 n.8 ("When the performance of official duty requires an interpretation of the law which governs that performance, the interpretation placed by the officer upon the law will not be interfered with, certainly, unless it is clearly wrong and the official action arbitrary and capricious.").

II. The Other New Material in the Amended Complaint Fails to Cure the Defects in Plaintiff's Claims.

The other changes in the Amended Complaint also fail to overcome the numerous failings detailed in the United States' Memorandum. Notwithstanding Plaintiff's newfound allegations that the APA provides jurisdiction in this case, Amended Compl., ¶¶ 5, 7, 49-57, it does not, see U.S. Mem. at 12-13 (APA inapplicable because adequate alternative remedy exists and no "final agency action" at issue), and simply asserting that it does cannot change this legal conclusion. Neither does Plaintiff's addition of a plethora of legal conclusions in the guise of facts, see, e.g., Amended Compl., ¶¶ 33, 43, 51-55, 59-62, change the conclusion that this action should be dismissed as a matter of law. See U.S. Mem. at 5-13, 24-28. Nor does the addition of conclusory allegations regarding Plaintiff's alleged injury, see, e.g., Amended Compl., ¶¶ 4, 56, 63, change the fact that Plaintiff has "failed to allege facts demonstrating any . . . injury." U.S. Mem. at 13-16 (emphasis added). Finally, other slight word changes in the Amended Complaint apparently made in an attempt to overcome the arguments set forth in the United States' Memorandum, see, e.g., Amended Compl., ¶¶ 24, 31, do not change the fact that the Government has complied with its Tunney Act obligations as a matter of law. U.S. Mem. at 16-23.

CONCLUSION

For the reasons discussed above and in the United States' Memorandum, Plaintiff's Motion for Preliminary Injunction should be DENIED and the case should be DISMISSED.

Dated: February 12, 2002.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served this 12th day of February 2002, in the manner indicated, upon the following:

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